

No.: 21-5152

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

LEWIS R. FOX - PETITIONER

Vs.

THE STATE OF OHIO - RESPONDENT

On Petition for Writ of Certiorari to the
Ohio Tenth Appellate District Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Lewis R. Fox, #733-986

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ORIGINAL

QUESTIONS PRESENTED

Lewis R. Fox's Writ of Ceriorari Petition raises a pressing issue of national importance and is a case of public or great interest involving a substantial constitutional question. This cause presents two critical issues:

1) Whether a trial counsel is to be considered incompetent when s/he fails to consult with their client (the criminal defendant) about their financial adequacies to afford expert witnesses to testify/consult on the criminal defendant's behalf; and, 2) Whether the application of res judicata can(not) be applied to a criminal defendant's post-conviction petition when the relied upon evidence was outside of the record?

LIST OF ALL PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Petitioner is unaware of any related cases.

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT	
A. Res judicata was erroneous and improperly applied to this petitioner's state post-conviction petition.....	5
B. A case such as this one presented here has not been ruled upon and is not clearly established by this Honorable Court	6
C. A trial counsel should be held ineffective when his/her unsound / erratical pretrial actions cannot be rehabilitated through subsequent trial proceedings.....	6
CONCLUSION.....	9

INDEX TO APPENDICES

APPENDIX A	<u>App. Page</u>
The Ohio Tenth Appellate District Court of Appeals Opinion.....	1-11
APPENDIX B	
The Franklin County Court of Common Pleas (Ohio) Decision.....	12-18
APPENDIX C	
The Ohio Supreme Court of Ohio Entry.....	19
APPENDIX D	
The letter from trial counsel (post-trial).....	20-21

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Kimmelman v. Morrison (1986), 477 U.S. 365.....	8
Lafler v. Cooper (2012), 566 U.S. 156.....	8
State v. Calhoun (1999), 86 Ohio St. 3d 279.....	5
State v. Duling (1970), 21 Ohio St. 2d 13.....	5
State v. Fox (Franklin County, Ohio C.P.C., Case No.: 15-CR-5585).	3
State v. Fox, 2020-Ohio-5521.....	1
State v. Reynolds (1997), 79 Ohio St. 3d 158.....	5
Strickland v. Washington (1984), 466 U.S. 668.....	Passim
STATUTES AND RULES	
OHIO REVISED CODE (O.R.C.) §2903.11.....	3
OHIO REVISED CODE (O.R.C.) §2953.21.....	3
28 U.S.C. §1257(a).....	1

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the state court(s) below.

OPINIONS BELOW

The opinion of the Ohio Tenth Appellate District Court of Appeals, which was the highest state court to review the merits appears at Appendix A to the petition and is reported at *State v. Fox*, 2020-Ohio-5521 (App. Pg. 1).

The opinion of the Franklin County Common Pleas Court appears at Appendix B to the petition and is unpublished (App. Pg. 12).

JURISDICTION

The date on which the highest state court (Ohio Supreme Court) decided my case was March 30, 2021. A copy of that decision appears at Appendix C (App. Pg. 19).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

—The Sixth Amendment to the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the [effective] Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

~~This case arises from this~~ petitioner's endeavor to overturn the lower court's decision regarding the denial of petitioner's state post-conviction petition.

This petitioner, on advisement of counsel, along with petitioner's fiancée, were the only witnesses to testify on petitioner's behalf at petitioner's trial by jury. No expert witnesses were called.

Petitioner was accused of two counts of Felonious Assault (both with the enhanced gun specifications) pursuant to Ohio Revised Code §2903.11.

This petitioner was arrested on the evening of October 29, 2015 (the city's designated day for Halloween) where before two uninvited women arrived at petitioner's house to confront petitioner: "to beat his ass." Awoken from his fiancée's frantic calls and unaware of whom was at the door making loud noises, grabbed his revolver, came downstairs to protect his family and his home from unwanted intruders.

It is at the doorway where the State's descriptive differences occur. Four separate testimonies heard between one (gun sounding) shot, to two, to three, to four shots; However, only two spent shell casings were in petitioner's revolver (no other casings, spent or otherwise were found). One Ms. Robinson was injured during the confrontation. The second woman was not harmed in anyway or manner.

Fox was ultimately found guilty of both counts of Felonious Assault (with gun specifications) and was sentenced to Ten (10) years imprisonment.

Fox timely filed a state post-conviction petition pursuant to the Ohio Revised code §2953.21 raising various Ineffective Trial Counsel claims; of which, pertinent to this Court, trial counsel: 1) failed to investigate, and 2) failed to call any expert witnesses on behalf of this petitioner.

The trial court applied res judicata, denying relief. (Case No.: 15-CR-5585, Franklin County Common Pleas Court, Ohio.) Appendix B.

Petitioner timely appealed the trial court's decision to the Tenth District
..... Appellate Court of Appeals of Ohio.

In denying petitioner's post-conviction appeal, the state court of appeals subsequently relied on the testimony of this petitioner; while disregarding the post-trial letter that was sent from petitioner's trial counsel to this petitioner. (Case No.: 19AP-677.) Appendix A. (Letter--Appendix D.)

The Ohio Supreme Court declined jurisdiction to hear petitioner's timely filed appeal. (Case No.: 21-0037) Appendix C.

REASONS FOR GRANTING THE WRIT

A. Res judicata was erroneous and improperly applied to petitioner's state post-conviction petition.

The Ohio Supreme Court has clearly established that under the Doctrine of Res Judicata: "[A] defendant cannot raise a issue in a motion for post-conviction relief if he or she could have raised the issue on direct appeal. *State v. Duling* (1970), 21 Ohio St. 2d 13." *State v. Reynolds* (1997), 79 Ohio St. 3d 158.

The petitioner also "bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and the the defense was prejudiced by counsel's ineffectiveness." *State v. Calhoun* (1999), 86 Ohio St. 3d 279, 283.

Petitioner asserts that neither addressing / lower courts acknowledged the post-trial letter sent from trial counsel to this petitioner where the trial counsel blatantly stated that he "did not discuss an expert" witness(es) because "experts generally cost significant amounts of money." Appendix D, Pg. 21. Basically, trial counsel did not inquire of this petitioner's ability to pay for experts / witnesses on petitioner's behalf. Trial counsel did not make any attempts to have witnesses provided at the State's expense either. Furthermore, he did not pursue any certain line of investigation, through pretrial factual findings, that is required before any competent attorney can make any reasonable strategic choices in preparing for trial.

Petitioner asserts that without the post-trial letter: Petitioner could not have supported his claims of ineffective counsel, and Petitioner's claims could not have been raised in a post-conviction petition. Moreover, had this petitioner raised such claims via a direct appeal, he could not have succeeded without the supporting "outside the record" evidence: the post-trial letter.

The lower addressing courts, by failing to acknowledge the "post-trial letter," circumvented petitioner's claims by its erroneous application of res

judicata. It is this petitioner's request for this Honorable Court to accept a Writ of Certiorari to correct the state court's erroneous application of res judicata and rule upon the merits of petitioner's ineffective trial counsel claims. A failure to accept jurisdiction will allow the State of Ohio and others to apply a bogus/erroneous procedural bars to criminal defendants with meritable claims.

- B. A case such as the one presented here has not been ruled upon and is not clearly established by this Honorable Court.**

While matters dealing with trial counsel being constitutionally ineffective is guided by this Court's precedent of *Strickland v. Washington* (1984), 466 U.S. 668; this Honorable Court has not clearly established or defined that pretrial counsel error can(not) be corrected through subsequent trial proceedings.

In the instant case, without this Court's intervention, a lower court's decision would stand, allowing a trial counsel his or her discretion to not inquire or investigate the cost associated with expert witnesses on his/her client's behalf, nor inquire whether the client could even afford such costs--denying a relevant obligation in preparing for a criminal defendant's trial. In respect to the United States Constitution, there is no mention that a trial counsel can discriminate, simply denying a criminal defendant his right to compulsory process (expert witnesses) because the counsel made an independent choice not based on the value of the witnesses, but solely on the cost (which appears to have never been investigated either).

Since this question has not been clearly established, not only this petitioner, but also others similarly situated, risk being denied federal habeas relief. Petitioner requests a Writ of Certiorari to clearly define / establish whether petitioner's claim is worthy of the *Strickland* standard.

- C. A trial counsel should be held ineffective when his/her unsound / erratical pretrial actions cannot be rehabilitated through subsequent trial proceedings.**

Under *Strickland*, a defendant claiming ineffective assistance of counsel

must identify specific acts or omissions of counsel that are alleged not to be within the realm of professional judgment. Strickland @ 690.

In petitioner's state post-conviction petition, he asserted that counsel failed to investigate: whether one shot or two were fired from petitioner's revolver; whether the injury sustained by the alleged victim was by the bullet or another object / projectile; where were both the alleged victims standing in relation to petitioner when the round(s) were accidentally discharged, i.e., the forensics and ballistics (through use of experts)--recreating the crime scene.

Trial counsel did not investigate or call expert witnesses regarding / supporting petitioner's trial testimony of holding the revolver in his non-dominant hand, of which, was under extensive remedial therapy for hand/arm damage. Trial counsel also allowed the stipulation of a medical doctor whom stated that the trajectory of the wound to the alleged victim was a down to upward motion of the right-outer thigh exiting the buttox. Without furthering the medical doctor's testimony by being put on the stand, an insinuation was left, declaring this was a serious life-threatening injury, which is an element required for the most serious level of (felonious) assault. To put things into perspective: The petitioner was in the doorway at a level six to ten inches higher than the alleged victim--it would have been impossible to have shot the alleged victim directly.

Trial counsel, through his post-trial letter, chose not to inquire of experts because of the cost, not of their lack of value.

The lower reviewing state court consistently referred to this petitioner's trial testimony where cross-examination attempted to distort petitioner's accuracy of events. It is common knowledge that expert witnesses carry a higher level of credibility than that of a potential "self-serving" testimonial from a criminal defendant.

Moreover, the lower court's analysis of expert witnesses was objectively unreasonable. The state court of appeals analyzed what effect the expert witnesses or investigation could have provided other than appellant's testimony or others during trial. Such decision requires an appellant to be an expert in each of these disciplines of expertise. These experts require vast amounts of formal education, training, knowledge, and experiences; none of which this petitioner has--so he is unsure of the potential that these experts could have provided, but without consultation with petitioner's trial counsel--he was deprived of any such knowledge. Disturbingly, the lower court relies upon this petitioner's own testimony--had these experts been investigated / called as witnesses within their expertise, this petitioner may not have needed to take the stand and testify on his behalf. Such a bar is extremely too high and is not required by **Strickland**.

This Court held in **Kimmelman v. Morrison** (1986), 477 U.S. 365, that a trial counsel whom failed to file a "pretrial" motion to suppress was prejudicial and such suppressed evidence would have changed the outcome of the trial proceedings. Petitioner's position is that his ineffective assistance of trial counsel errors are similar, yet, distinctive.

"Here, the question is the fairness or reliability not of the trial but of the processes that preceded it, which caused [petitioner] to lose benefits he would have received but for counsel's ineffective assistance." **Lafler v. Cooper** (2012), 566 U.S. 156, 157.

In this case, if trial counsel would have investigated and obtained these experts (or others not mentioned), counsel would have obviated this petitioner and his fiancée's testimonies. In a worst case scenario, if both had testified, their testimonies would have been examined for accuracies and supported with more credible "expert witnesses." Thus there is a reasonable probability that, but for counsel's deficient "pretrial" performance in failing to investigate /

calling expert witnesses on behalf of his client and/or requesting witnesses at the state's expense; the outcome of the trial proceeding would have been different. *Strickland* @ 687. Where in the constitution does it declare that a poorer criminal defendant should have a lesser defense simply because the trial counsel believes s/he cannot afford it (or vice versa)?

Petitioner respectfully requests this Honorable Court to allow this petition for a writ of certiorari to allow further investigation of petitioner's claims of ineffective assistance of trial counsel's pretrial errors and the prejudicial effects that may (not) have been mentioned throughout this petition and whether or not that this case meets the *Strickland* standards for review.

CONCLUSION

The petition for a writ of certiorari should be granted in this extraordinary case of ineffective assistance of trial counsel. This Court's review is warranted not only to resolve, but also to maintain the public's confidence that courts will not permit a criminal defendant's conviction where and when trial counsels fail to inquire not only of the costs associated with expert witnesses, but also fail to inquire whether or not a criminal defendant could afford such witnesses, let alone at the state's expense, and what those witnesses could have provided to the defense.

Respectfully submitted,

Lewis R. Fox

Date: 6-1-2021